

# Right to Development and IP Law: What Implications for the Multilateral Framework?

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## The Right to Development (RtD): the forgotten HR in the IP/HR interface?

- The Right to Development (RtD) is often overlooked in the IP/HR interface both in terms of policy discussions and scholarly works.
- Why ?
  - RtD is a HR contested by some developed countries
  - Developing countries have not explicitly invoked the RtD in IP forums such as WTO and WIPO
  - Limited mainstreaming in the UN system and beyond

## What is the RtD ?

“The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”

(Article 1.1, 1986 Declaration on the Right to Development)

“The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.”

(Article 1.2)

## The RtD : Important Milestones

- UN Declaration on the RtD (1986), UNGA 41/128
- The Vienna Declaration and Programme of Action (1993):
  - Reaffirmed the RtD as a universal and inalienable right and an integral part of fundamental human rights.
- Annual UN General Assembly resolution on the RtD
  - Most recent: A/RES/67/171 (2012)
  - Voting pattern:
    - 154 countries in favour
    - 4 against: Canada, Israel, UK and US
    - 28 abstentions: some but not all European countries: (most notably Denmark, Finland Germany, Netherlands Norway, Poland and Sweden) + Australia, Japan New Zealand and Republic of Korea.

## The RtD: Main HR bodies

- The Working Group on the RtD
  - Open-ended intergovernmental body
- High-Level Task Force on the Implementation of the RtD
  - Established in 2004 and lasted until 2010.
  - Examined Millennium Development Goal 8, on a global partnership for development, which led to development of criteria for evaluation of global partnerships with the aim to improve their effectiveness in support of the realization of the RtD. The criteria were applied, on a pilot basis and for the period of 2007-2009, to selected partnerships
  - The Task Force developed a set of criteria and operational-sub-criteria for the implementation of the RtD with the purpose of translating the RtD from political commitment to development practice.

## Challenges facing the RtD

- A HR contested by a few: some developed countries – most notably the US – oppose it.
- Disagreements over its future direction:
  - Developing countries wish to see it codified in a **binding legal instrument**.
  - Developed countries oppose such a move.
- Operationalization: How can the RtD be put into practice?

## The RtD and IP interface: conflict or harmony?

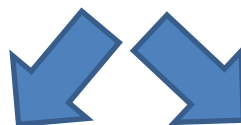
- “Clearly, there is considerable tension between IPRs and the RtD.
- The recognition of a RtD might be the basis on which to argue that states should cooperate in lowering levels of IP protection in some areas, or at least not to advance those levels.
- However, it is important to note that there is no necessary conflict between the RtD and IP. If it turns out to be empirically true that IPRs contribute to economic development, there is no conflict.”

P. Drahos

## But what do we really mean by IP and development?

### IP FOR DEVELOPMENT

- Using IP for promoting innovation and economic growth
- Improving IP administration
- Strengthening the Infrastructure supporting the use of the IP system



### DEVELOPMENT ORIENTED IP

- Balanced IP regimes
- Social welfare
- Using flexibilities, limitations and exceptions in IP rules
- Taking into consideration different levels of development
- Ensuring that IP is supportive of public policy objectives
- Competition policy



# The RtD and the multilateral IP framework

RTD



TRIPS Agreement (1994)  
Doha Ministerial Declaration (2001)  
Doha Declaration  
on TRIPS and Public Health (2001)



WIPO Development  
Agenda (2007)

# Relevance and implications of the RtD to WTO: TRIPS Agreement

## ***Preamble***

*Recognizing* the underlying public policy objectives of national systems for the protection of IP, including developmental and technological objectives;

## ***Article 7: Objectives***

The protection and enforcement of IPRs should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and **in a manner conducive to social and economic welfare**, and to a balance of rights and obligations

## ***Article 8: Principles***

Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

## Relevance and implications of RtD to WTO: Doha Ministerial Declaration (2001)

19. We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this declaration, to examine, inter alia, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1.

In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.

## Relevance and implications of RtD to WTO: Doha Declaration on TRIPS and Public Health (3)

4. We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.

In this connection, we reaffirm the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide **flexibility** for this purpose.

# Relevance of RtD to WIPO: WIPO's Mandate and Mission

## Mandate

- To promote the protection of intellectual property throughout the world through cooperation among States (1967 Convention).
- To promote creative intellectual activity and to facilitate the transfer of technology to developing countries in order to accelerate economic, social and cultural development (1974 Agreement with the UN).

## Mission

- Our mission is to promote innovation and creativity for the economic, social and cultural development of all countries, through a balanced and effective international intellectual property system.

# Relevance of RTD to WIPO: The WIPO Development Agenda (DA)



- Initiative launched by 12 developing countries (2004)
- 45 recommendations adopted (2007).
- Ongoing implementation process: a work in progress.
- Committee on Development and Intellectual Property (CDIP) tasked with monitoring implementation of DA

# WIPO DA and the changing global IP conversation

Evolving narrative from:

- Stronger IP= Development
- Absolute benefits of IP
- Compliance with international obligations
- Enforcement of IPRs
- Isolation of IP from broader policy debates and challenges

To :

- IP not an end in itself
- No 'one size fits all' approach to IP
- IP has benefits and costs
- Need for balanced IP
- Public Domain
- Flexibilities, limitations and exceptions
- Promoting access to knowledge and technology transfer
- Attention to economic evidence about IP
- Greater engagement of IP with public policy challenges

# WIPO Development Agenda: Recommendation 15

Norm-setting activities shall:

- be inclusive and member-driven;
- take into account different levels of development
- take into consideration a balance between costs and benefits
- be a participatory process, which takes into consideration the interests and priorities of all WIPO Member States and the viewpoints of other stakeholders, including (IGOs) and NGOs;



## Human Rights and the WIPO DA: Statement by OHCHR at CDIP (2008)

- In March 2008, at the first session of the CDIP, the OHCHR welcomed the adoption of a DA by the General Assembly of WIPO, and the creation of the committee on development of intellectual property.
- OHCHR specifically welcomed recommendation 35, which requested WIPO “to undertake upon request of Member States, the new studies to assess the economic social and cultural impact of the use of intellectual property system in these states”.
- OHCHR encouraged Member States and the Committee to consider the use of human rights impact assessment in developing a work program for implementation of the recommendation.

# Human Rights Bodies, the RtD and the WIPO DA: The 2009 Review of the WIPO DA

- In 2008, the Human Rights Council endorsed the recommendation of the Working Group requesting the Task Force to “to hold consultations to gather information about the WIPO DA in relation to realization of the RtD”.
- A technical mission undertook a review the WIPO DA and was led by Professor Sakiko Fukuda Par, member of the Task Force. It resulted in an interesting report (A/HRC/15/WG.2/TF/CRP.1- , 19 November 2009).

What did the report say?

- The WIPO DA is one of the most – and arguably the most - important of the current global initiatives in advancing the realization of the right to development.

# Human Rights Bodies, the RtD and the WIPO DA: The 2009 Review of the WIPO DA from RtD perspective

- Although the Agenda does not directly refer to the right to development, the basic motivations and objectives of the agenda are aimed at establishing an enabling environment at national and global levels that facilitates equitable, sustainable and participative process of development.
- While technology plays an important role in development – especially to the achievement of the MDGs (recommendation 22) – IP systems can have both positive and negative repercussions and be distributionally uneven.
- Thus, implementation of the WIPO DA responds directly to a core obligation to promote the right to development in the context of the present economic and technological environment.

## Opportunities for further operationalization of the RtD

- Effective implementation of the UNGA on the RtD
  - 42. Calls upon the UN funds and programmes, as well as the specialized agencies, to mainstream the right to development in their operational programmes and objectives, and stresses the need for the international financial and multilateral trading systems to mainstream the right to development in their policies and objectives;
  - 43. Requests the Secretary-General to bring the present resolution to the attention of Member States, United Nations organs and bodies, specialized agencies, funds and programmes, international development and financial institutions, in particular the Bretton Woods institutions, and non-governmental organizations;
- Recommendation 35 of the WIPO DA:
  - requests WIPO “to undertake, upon request of Member States, new studies to assess the economic social and cultural impact of the use of intellectual property system in these states.”

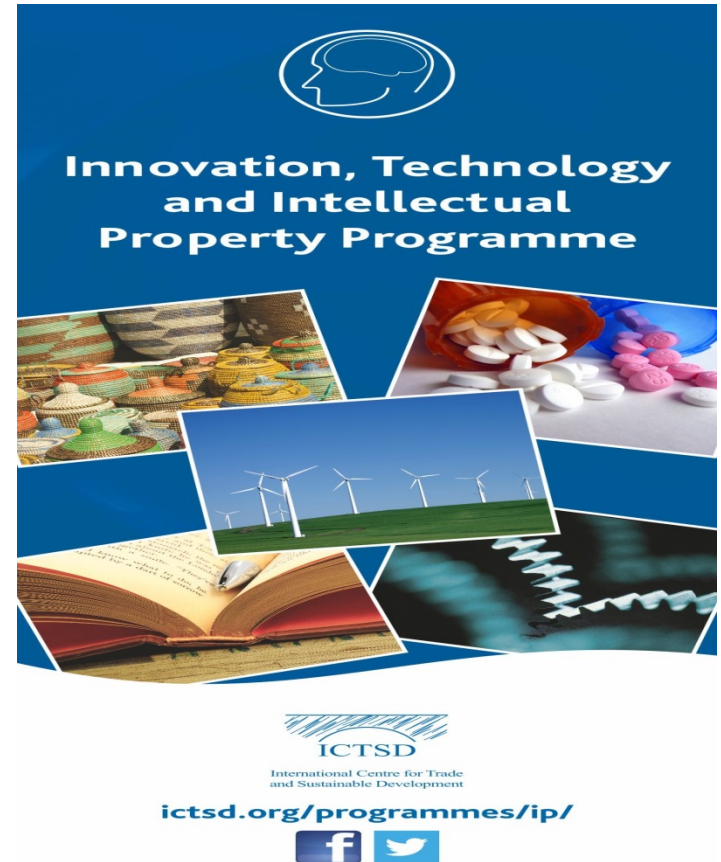
## Conclusions

- Though not explicitly mentioned in multilateral IP forums, the RtD has to some extent been de facto operationalized and put into practice by important developments such as the Doha Declaration on TRIPS and Public Health and most notably the WIPO Development Agenda.
- The Rtd can be of further value in evaluating the implementation of initiatives such as the WIPO DA.

**Thank you**

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